BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARK C. BYERS	)	
Claimant	)	
V.	)	Docket No. 1,065,481
	)	
ACME FOUNDRY, INC.	)	
Self-Insured Respondent	)	

ORDER

Claimant requests review of Administrative Law Judge Bruce E. Moore's April 11, 2014 preliminary hearing Order. William L. Phalen of Pittsburg, Kansas, appeared for claimant. Paul M. Kritz of Coffeyville, Kansas, appeared for the self-insured respondent.

The record on appeal is the same as what the judge considered and consists of claimant's October 29, 2013 deposition transcript, Jason Zimmerman's October 29, 2013 deposition transcript, Jane Hughes' December 16, 2013 deposition transcript, Jody Stritzke's December 16, 2013 deposition transcript, the March 12, 2014 preliminary and motion hearing transcript, all exhibits associated with all such transcripts, and all pleadings contained in the administrative file.

ISSUES

The judge concluded claimant refused to comply with respondent's post-accident drug testing policy. As such, the judge granted respondent's motion to dismiss, finding claimant forfeited benefits under the Kansas Workers Compensation Act.

Claimant requests reversal, arguing he did not refuse to provide a urine sample for drug testing. He asserts there have been problems with defective testing cups in the past and his urine should have been poured into another cup to see if a temperature would register. Claimant contends the judge lacked statutory authority to dismiss the claim. Claimant also argues respondent, by way of its employee manual, had a binding contract to provide claimant with ongoing medical treatment following his work injury. Respondent maintains the Order should be affirmed.

The issues for the Board's review are:

1. Did claimant forfeit workers compensation benefits by refusing to submit to a post-accident drug test, pursuant to K.S.A. 2012 Supp. 44-501(b)(1)(E)?

2. Does K.S.A. 2012 Supp. 44-501(b)(1)(E) allow dismissal of a claim?

FINDINGS OF FACT

Claimant worked as a grinder for respondent for two years. On May 13, 2013, claimant was injured around 5:20 a.m. He testified, "I was grinding on a piece of metal and something struck me. I looked down, my left arm was just hanging there. I put the grinder down with my right and I go off to the bathroom holding my arm."[1] Claimant indicated his arm was bleeding and he had to hold it because it would not support itself. He reported the accident to his supervisor and was taken to the nurse's station. A company EMT took claimant to the Coffeyville Regional Medical Center emergency room.

Claimant was admitted to the emergency room at 6:00 a.m. The history provided by claimant was that he was using an airgun at work when he felt something pop. He did not have any external signs of injury. A biceps tendon tear was suspected and an MRI was ordered. Claimant remained at the hospital through the day so the MRI could be performed and interpreted. During this time, he was given food and beverage, and underwent three injections, which he testified provided some pain relief. Somebody at the hospital contacted the company nurse, Jody Stritzke, and advised claimant was ready to be picked up. After being discharged from the hospital, claimant started walking back to the plant – close to two miles from the hospital – because nobody was present to give him a ride. According to claimant, when he was about halfway to Acme Foundry, Ms. Stritzke picked him up. Claimant was frustrated, angry and in pain.

Ms. Stritzke testified she picked claimant up a couple of blocks from the hospital around 2:20 p.m. She testified claimant seemed agitated. When she asked how he was doing, he responded he "wasn't doing very good, that he'd been there all day and he was sick and tired of questions being asked to him and he was ready to get away from everyone."[2] She then inquired if he had any restrictions or what his paperwork said and, according to her, he kind of tossed or threw the paperwork at her. After informing claimant he would need to take a drug test when they returned to the plant, he "acted perturbed."[3] She acknowledged at this point, claimant did not refuse to undergo drug testing.

Respondent's drug and alcohol policy allows post-injury drug and alcohol testing. Claimant also signed an employee acknowledgment form in which he consented to post-injury drug and alcohol screening.

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[1] P.H. Trans. at 12. At his deposition, claimant testified he was operating an air hammer when the next thing he knew, his left hand was not on the hammer and he was in so much pain he went to the bathroom to vomit. (Claimant Depo. at 18).

[2] Stritzke Depo. at 17-18.

[3] *Id*. at 24.

When claimant and Ms. Stritzke arrived at the plant, Ms. Stritzke attempted to look at claimant's paperwork, but according to her, "he was still pretty agitated, and he said I thought we were going to do this drug test, and I said we are but I need to look at your paperwork. And he - - he was about in tears at that time. He just was - - was ready to go home. He wanted to get out of there. And I said look, I'm sorry, I'm only one person here. I need to get a witness . . . ."[4] She called Jane Hughes, an HR assistant, to witness the drug test.

When collecting a urine sample for drug testing, respondent uses a pre-packaged container consisting of a collection cup with a lid (called the CRL Stat One-Step Onsite drug cup).[5] The container is stored within a plastic bag, which is opened in front of the individual to be tested. The collection cup is removed from the bag, and the top is removed to demonstrate to the individual being tested the cup is empty. The cup has a built-in temperature gauge and a line showing the amount of urine necessary for testing. Once the cup has a sufficient quantity of urine placed in it and the temperature strip has turned green, preliminary field tests are administered to determine the possible presence of prohibited drugs in the urine. If the field testing suggests the presence of prohibited drugs, the cup is sealed, chain of custody forms are completed, and the sample is sent to a drug testing laboratory for formal testing. If field testing indicates a negative result, the matter is concluded without further testing.

Ms. Stritzke is in charge of the UA program and one of the individuals authorized by respondent to administer drug tests. She testified the number of drug tests depends on hiring and injuries, but respondent performs at least six random drug tests a week. She admitted she has had to administer two or three tests on one person because of defective cups. According to her, approximately three times a month she will give a test and not get an accurate temperature reading and she will have to pour the urine into a different cup.

Once Ms. Hughes arrived at the nurse's station, Ms. Stritzke began the test. While all three of them were in the bathroom, Ms. Stritzke took a collection cup out of the package, removed the lid and showed claimant the cup was empty. She then explained to him she needed a sufficient amount of urine (at least 30 milliliters), such that the urine would be above the temperature gauge line, and the temperature gauge needed to turn green or she could not use the urine sample. Ms. Hughes confirmed that Ms. Stritzke told claimant how much urine was needed to get a temperature, including that the sample needed to exceed the white strip above the temperature line, and that claimant appeared to understand and be cooperative. Ms. Stritzke asked him not to flush the toilet or run any water in the sink. She and Ms. Hughes then left the restroom with the door cracked between two and five inches.

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[4] *Id*. at 25.

[5] P.H. Trans., Resp. Exs. A1, A2 and A3.

According to Ms. Stritzke and Ms. Hughes, after claimant finished providing a urine sample, there was urine in the cup up to the black temperature line. Ms. Stritzke tilted the cup, but was unable to get a temperature reading because there was not enough urine. Ms. Stritzke announced there was not enough urine in the cup and she was not getting a temperature reading. At that time, claimant left the restroom, picked up his hard hat and said "see you ladies later."[6] Claimant was about two feet away from her when Ms. Stritzke explained to him that there was not enough urine in the cup and he needed to wait because they still needed to finish the test. Claimant continued to walk away and Ms. Stritzke chased him out the door saying, "please don't leave, please don't go, you can lose your job if you don't finish your drug test."[7] Claimant acknowledged Ms. Stritzke probably told him more than once that he needed to take another test and, after he left the building, she still followed him and tried to get him to take another test.

Ms. Hughes testified about what transpired:

> Um, he said he was leaving. Well, I don't know whether he said it; but he just walked out and picked up his hard hat and safety glasses; and Jody said, well, don't leave because we haven't finished the drug test yet; and he said I'm - - I'm going to leave. He just said I'm leaving, walked towards the door. She said again we have to finish this before you can go, and he just kept on walking, and then she went to the door following him. I think she actually even stepped outside the door and said that we needed to finish the drug test and that he - - if he walks out that he could possibly lose his job by us not finishing the process.[8]

Ms. Stritzke acknowledged it was possible the cup may have been defective, but she was unable to transfer the urine to a new cup for testing because she would need claimant's consent and he left without completing the chain of custody paperwork. She discarded the cup in the trash.

Both Ms. Stritzke and Ms. Hughes signed a post-accident drug and alcohol screening form that stated the temperature of claimant's test was "no temp." and claimant "Walked out! Did Not Complete."[9] According to Ms. Stritzke, the situation with claimant was the first time in her 17 years working for respondent that a worker simply left the building after giving a sample that registered no temperature reading. In other situations, the worker would be given the opportunity to provide a sample in another cup when he or she is ready to urinate again.

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[6] Stritzke Depo. at 41.

[7] *Id*. at 44.

[8] Hughes Depo. at 31.

[9] *Id*., Ex. 1; see also Stritzke Depo., Ex. 1.

Claimant testified regarding his recollection of the events surrounding the drug test:

> Q. Okay, so when you got back to Acme, what happened?
>
> A. Let's see, we go in the office, I sit down in a chair, she starts talking to me asking me how it happened and stuff. I think she goes off and gets a cup and we go to the bathroom, I pee in the cup, set it down, I go back out in the hall. She goes into the bathroom, she asks me to go in and sit down in the nurse's station. She comes back out, I don't know, she is going on and on about something, I can't hardly remember that much about that part but she said it wasn't, I don't know, wants me to take another one.
>
> Q. Did she say why she wanted you to take another one?
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> A. No, she didn't. I don't think she did at the time.
>
> Q. Okay, what happened next?
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> A. I was in so much pain all I could do was think about getting out of there. She keeps telling me I need to do another one, and if she has my prescription - - but only thing I was thinking about is my pain in the arm and going home, listening to her telling me I'm fired when I'm walking out the door or something like that.[10]

Ms. Stritzke advised what happened to respondent's Director of Human Resources, Jason Zimmerman. Mr. Zimmerman told Ms. Stritzke to cancel claimant's appointment with an orthopedic surgeon. On May 14, 2013, claimant phoned Mr. Zimmerman to inquire why he was not going to be seen by the orthopedic surgeon. Mr. Zimmerman testified:

> Q. Then he calls up and what else did he say on the phone?
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> A. He wanted to know what was going on. I said I had an issue with the fact that he did not complete the drug test the day before and he told me that I would have refused to take it, too.
>
> Q. Okay, and did you ask him, did it appear to you there had been a mix-up in the communications between my client and Jody?
>
> A. No, but he said you would have refused to take it too. To me that meant he knew he was refusing to take the test.
>
> Q. The second test?
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> A. Right, he was refusing to complete the test as directed by Acme Foundry.[11]

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[10] Claimant Depo. at 30-31.

[11] Zimmerman Depo. at 38.

Mr. Zimmerman further testified:

> Well, when he said I would have refused, too, I asked him why he had refused and he said he had been there all day and just didn't want to do it, didn't want to take the test, and he was going home and I would have done the same thing in his shoes. And I told him that I wouldn't have, I would have complied with the drug test. And at that point he said so what you are telling me is that I'm terminated and I said I'm not saying that, I wanted to visit with you about why you didn't take the, or complete the drug test and he told me well, I'll just take it as I'm terminated and you will talk to my lawyer and hung up the phone."[12]

Mr. Zimmerman has been respondent's Director of Human Resources since 1999. He testified the instance with claimant was the first time a worker has given an insufficient chemical test sample and simply left the building without first providing a valid sample.

Following presentation of evidence, the judge ruled:

> Claimant argues that there have been problems with defective urine sample cups in the past, and that the cup that was provided to Claimant on May 13, 2013 was defective because it did not register a temperature. He argues that the sample provided by Claimant should have been poured in another cup to see if a temperature would register. In essence, Claimant asks the court to speculate that the sample was of an adequate temperature and that the cup was defective. Claimant fails to address his refusal to provide a sufficient quantity of urine to be considered a testable sample.
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> **K.S.A. 2012 Supp. 44-501(b)(1)(E)** provides that
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> > An employee's refusal to submit to a chemical test at the request of the employer shall result in the forfeiture of benefits under the workers compensation act if the employer had sufficient cause to suspect the use of alcohol or drugs by the claimant or if the employer's policy clearly authorizes postinjury testing.
>
> Implicit in the statute's requirement for submission to a chemical test, is a requirement that the employee provide a sufficient sample for testing. Provision of an inadequate sample denies the employer the opportunity to conduct testing, and defeats the purpose of **K.S.A. 2012 Supp. 44-501(b)(1)(E)**.
>
> This is not a case where the employer contends that it had probable cause to test for drugs or alcohol, and there is no contention that the employee was under the influence of alcohol or drugs at the time of the accident. This is a case where the employer had a policy authorizing post-accident testing, Claimant was aware of that policy, Claimant had an accident, and Claimant refused to provide a sample sufficient to enable Respondent to conduct the testing authorized by statute and its

[12] *Id*. at 44-45.

> own policy. This is not a case where the claimant was ***unable*** to provide a sample. Claimant never told anyone at the time that he was unable to provide any more urine. When advised that the sample was insufficient, Claimant responded with "See you ladies later," and left the premises, refusing to discuss the matter further. If Claimant had advised Ms. Stritzke that he was unable to provide any more urine, this court would reach another result. Here, Claimant simply refused to give a sufficient quantity of urine to allow testing, and refused to discuss the matter when advised his sample was insufficient. When Claimant spoke with Jason Zimmerman the next day, he acknowledged that he had refused to provide a sufficient sample, and argued that Zimmerman would have refused as well.
>
> Claimant refused to comply with Respondent's post-accident testing policy by giving an inadequate urine sample to allow testing. **K.S.A. 2012 Supp. 44-501(b)(1)(E)** mandates that he has forfeited benefits under the workers compensation act.
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> Claimant's Preliminary Hearing requests and **CONSIDERED** but **DENIED**, and Respondent's Motion to Dismiss is **CONSIDERED** and **GRANTED**. [13]

Thereafter, claimant filed a timely appeal.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501(b)(1)(E) states:

> An employee's refusal to submit to a chemical test at the request of the employer shall result in the forfeiture of benefits under the workers compensation act if the employer had sufficient cause to suspect the use of alcohol or drugs by the claimant or if the employer's policy clearly authorizes post-injury testing.

In *Seybold*,[14] this Board Member previously analyzed the meaning of "refusal" for a chemical test by looking at how the Kansas Supreme Court defined the word "refusal" in the context of K.S.A. 44-518:

> The better method to discern the meaning of "refusal" is to look at Kansas Supreme Court precedent precisely concerning the definition of "refusal" in the context of our workers compensation law. This Board Member sees no reason to define "refusal" for K.S.A. 2012 Supp. 44-501(b)(E) purposes any differently than the Kansas Supreme Court defined "refusal" for K.S.A. 44-518 purposes in *Neal*:[15]

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[13] ALJ Order at 3-4.

[14] *Seybold v. Simplex Grinnell*, No. 1,067,611, 2014 WL 889883 (Kan. WCAB Feb. 18, 2014).

[15] *Neal v. Hy-Vee, Inc.*, 277 Kan. 1, 81 P.3d 425 (2003).

> The very nature of the language used in 44-518 suggests that before suspension of benefits, there must be an affirmative act on the part of the employee to frustrate the employer's discovery or examination. In our interpretation of 44-518, we follow a familiar maxim of statutory construction which provides: "Ordinary words are to be given their ordinary meaning, and a statute should not be so read as to add that which is not readily found therein or to read out what as a matter of ordinary English language is in it. [Citation omitted.]" *GT, Kansas, L.L.C. v. Riley County Register of Deeds*, 271 Kan. 311, 316, 22 P.3d 600 (2001).
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> Black's Law Dictionary defines "refusal" as "[t]he act of one who has, by law, a right and power of having or doing something of advantage, and decline it." Black's also indicates that the declination of a request or demand, or the omission to comply with some requirement of law, be "*as the result of a positive intention to disobey*." (Emphasis added.) *Refusal* is often coupled with "neglect," but Black's notes that neglect signifies a mere omission of a duty "*while 'refusal' implies the positive denial of an application or command, or at least a mental determination not to comply*." (Emphasis added.) Black's Law Dictionary 1282 (6th ed. 1990).
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> "Obstruct" is defined as "[t]o hinder or prevent from progress, check, stop, also to retard the progress of, make accomplishment of a difficult and slow.... To impede." Black's Law Dictionary 1077 (6th ed. 1990).
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> The ordinary meaning of the words used in K.S.A. 44-518 contemplate a positive intention to disobey and to hinder. We believe K.S.A. 44-518 contemplates circumstances where an employee makes a deliberate decision not to attend the examination or to obstruct or prevent the employer from gathering its own independent evaluation of his medical condition. Thus, the Board's interpretation that there must be an element of willfulness or intent is consistent with the ordinary meaning of the words of K.S.A. 44-518.
>
> . . .
>
> Based upon the cases cited above and the clear import of K.S.A. 44–518 we, like the Board, conclude that the terms "refusal" and "unnecessarily obstructs" carry with them an element of willfulness or intent.[16]

[16] *Id.* at 15-16.

Bergstrom[17] makes it clear that using plain meaning when interpreting statutes is paramount.

"Administrative agencies are creatures of statute and their power is dependent upon authorizing statutes, therefore any exercise of authority claimed by the agency must come from within the statutes. There is no general or common law power that can be exercised by an administrative agency."[18] The Kansas Workers Compensation Act is substantial, complete, and exclusive, and covers every phase of the right to compensation and of the procedure to obtaining it.[19]

ANALYSIS

1. Claimant forfeited benefits under the Act due to his refusal to submit to respondent's requested chemical test.

The main issue is if claimant refused to submit to respondent's request for a chemical test. Claimant raises a number of interesting and tangential concerns, but these concerns are not particularly helpful in resolving the issue at hand.[20]

Under the *Neal* definition of "refusal," willful intent to avoid the test is necessary for a forfeiture of benefits under K.S.A. 2012 Supp. 44-501(b)(1)(E).

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[17] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607-608, 214 P.3d 676 (2009).

[18] *Acosta v. Nat'l Beef Packing Co., L.P.*, 273 Kan. 385, 396, 44 P.3d 330 (2002) (quoting *Legislative Coordinating Council v. Stanley*, 264 Kan. 690, 706, 957 P.2d 379 (1998)).

[19] See *Jones v. Continental Can Co.*, 260 Kan. 547, 557, 920 P.2d 939 (1996).

[20] Whether claimant was in pain, wanted to get home, or was forced to walk back to Acme from the hospital does not address if a chemical test refusal occurred. This case does not hinge on whether the test sample would have proven claimant was under the influence or using alcohol or drugs on the date of accident. The fact claimant did not appear to be under the influence is of no concern; given respondent's policy for post-injury testing, there was no need for respondent to have sufficient cause to believe claimant had been using drugs or alcohol. This case does not concern the accuracy of respondent's test procedures, whether respondent administers testing in an arbitrary manner, whether there was a history of the test cups being defective, or whether the test cups are stored improperly. This case does not concern whether Ms. Stritzke should have poured the contents of the sample into another sample container. Ms. Stritzke's disposal of the sample, which claimant equates as destruction of evidence, does not address whether a drug test refusal occurred. Whether the test sample should have been sent for additional testing is irrelevant. It makes no difference whether the test arguably should have been performed at the hospital as opposed to respondent's premises. The argument that a blood test would have been better than a urine test is not on point. The Board will not address what claimant defines as a binding contractual obligation, as based on respondent's personnel manual, for respondent to provide medical treatment following a work injury.

While claimant produced some urine for respondent, he refused to submit to the chemical test. Claimant was told the sample was inadequate, but simply said, "see you ladies later." After being told the test was not finished, claimant left respondent's premises, despite Ms. Stritzke imploring him to stay and complete the testing, lest he run the risk of losing his job. Claimant acknowledged hearing Ms. Stritzke tell him as he left that he needed to take another test. Ms. Hughes confirmed much of Ms. Stritzke's testimony. According to Mr. Zimmerman, claimant acknowledged refusing the test when they spoke the day after the accident. These facts show claimant demonstrated a positive and willful intention to not fully comply with the testing, and to disobey, hinder, obstruct or prevent respondent from obtaining a sample sufficient for testing.

This case is unlike *Seybold*, where a claimant attempted to complete a drug test, but was unable to do so for medical reasons. A nurse told Mr. Seybold she would simply record that he was unable to give a sample and that he could go home.

This Board Member affirms the judge's denial of benefits based on operation of K.S.A. 2012 Supp. 44-501(b)(1)(E).

2. The judge lacked jurisdiction to dismiss the claim.

In his application for review, claimant asserted the judge lacked statutory authority to dismiss his claim, but he provided no real argument thereafter. However, as noted in *Acosta*, the power of the Division of Workers Compensation is limited by statute. K.S.A. 2012 Supp. 44-501(b)(1)(E) states that a worker who refuses to submit to an employer-requested chemical test forfeits benefits under the workers compensation act, but the statute does not say the claim is thus dismissed.

The Act provides a basis for dismissal for a claimant's refusal to attend an employer's scheduled medical evaluation under K.S.A. 44-518 and failure to prosecute a claim under K.S.A. 2012 Supp. 44-523, but K.S.A. 2012 Supp. 44-501(b)(1)(E) contains no such similar language. Whether there is a distinction between a "dismissal" and a "forfeiture of benefits" may be purely academic, but the language of the statute does not involve claim dismissal. As such, the portion of the Order dismissing the claim is vacated.

CONCLUSION

WHEREFORE, the undersigned Board Member affirms the April 11, 2014 Order to the extent claimant's request for preliminary benefits was denied based on K.S.A. 2012 Supp. 44-501(b)(1)(E), but vacates the portion of the Order dismissing the claim.[21] This is not a final order for purposes of appellate review.

[21] By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

IT IS SO ORDERED.

Dated this _____ day of June 2014.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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Honorable Bruce E. Moore